



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2004

Ms. Jennifer S. Kaufman
Assistant General Counsel
Texas State Board of Medical Examiners
P. O. Box 2018
Austin, Texas 78768-2018

OR2004-5476

Dear Ms. Kaufman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204627.

The Texas State Board of Medical Examiners (the "board") received a request for any information related to a named licensee. You state that some of the requested information has been provided to the requestor. However, you claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note that a portion of the submitted information consists of licensure information relating to a named physician. The board currently has five lawsuits pending against the Office of the Attorney General over the release of similar types of information, *Texas State Board of Medical Examiners v. Abbott*, Cause No. GN302004, 345th District Court of Travis County, Texas; *Texas State Board of Medical Examiners v. Abbott*, Cause No. GN302065, 250th District Court of Travis County, Texas; *Texas State Board of Medical Examiners v. Abbott*, Cause No. GN302509, 353rd District Court of Travis County, Texas; *Texas State Board of Medical Examiners v. Abbott*, Cause No. GN302510, 53rd District Court of Travis County, Texas; and *Texas State Board of Medical Examiners v. Abbott*, Cause No.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

GN302640, 98th District Court of Travis County, Texas. Your arguments in the instant request for decision are similar to the board's arguments in the pending litigation of the prior rulings. Accordingly, we are closing our file with regard to the licensure information without issuing a decision and will allow the trial court to determine whether the types of information at issue must be released to the public.

In regard to the remaining submitted information, we note that the board has not sought an open records decision from this office within ten business days as prescribed by section 552.301. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Thus, we will address your argument under section 552.101 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. Section 164.007(c) provides the following:

(c) Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

Occupations Code § 164.007(c). Section 164.007(c) applies to investigatory records gathered by the board during an investigation of a license holder. We understand that the remaining submitted information constitutes the board's investigative information relating to a licensed physician. Therefore, we conclude that the board must withhold this information under section 552.101 in conjunction with section 164.007(c) of the Occupations Code.

In summary, we are closing our file with regard to the licensure information without issuing a decision and will allow the trial court to determine whether this information must be released to the public. Also, the board must withhold its investigative information under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code.

Although you request that this office issue a previous determination regarding the information at issue, we decline to do so at this time. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/krl

Ref: ID# 204627

Enc: Submitted documents

c: Mr. David L. Botsford
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(w/o enclosures)